Supreme Court, U.S.
FILED

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(1)

No. _____

In the
Supreme Court of the United States

GLENN E. HURN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a *Batson* hearing, a prosecutor gave only one reason (later held invalid) for peremptorily challenging a racial minority. When that reason was challenged on appeal, he provided a different reason more than two-and-one-half years after the trial. Is a prosecutor estopped from offering a new purported reason for peremptorily challenging a racial minority after the initial *Batson* hearing?

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In The

SUPREME COURT OF THE UNITED STATES

GLENN E. HURN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Corporal Glenn E. Hurn, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Armed Forces in *United States v. Hurn*, 58 M.J. 293 (2003), denying Petitioner's Petition for Reconsideration is located in Appendix B at 8a. The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Hurn*, 58 M.J. 199 (2003), is located in Appendix A at 1a-7a. The order of the United States

for Reconsideration is located in Appendix C at 9a. The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Hurn*, 55 M.J. 446 (2001), is located in Appendix D at 10a-21a. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals in *United States v. Hurn*, 52 M.J. 629 (N-M. Ct. Crim. App. 1999) is located in Appendix E at 22a-35a.

JURISDICTION

The lower court granted review of Petitioner Hurn's case and affirmed his conviction on April 23, 2003. That court denied Petitioner's timely motion for reconsideration on May 30, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1259(3) (2000). Petitioner invoked the jurisdiction of the Court of Appeals for the Armed Forces under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3) (2000). The Navy-Marine Corps Court of Criminal Appeals had jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2000).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment states:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner, an African American, was charged at a general court-martial with rape, robbery, forcible sodomy, assault, indecent acts, and indecent assault, in violation of Articles 120, 122, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 820, 922, 925, 928, and 934 (2000), respectively.

Petitioner elected to be tried by a panel of court members (the military equivalent of a jury trial) with enlisted representation. The trial began on April 7, 1997. After voir dire and challenges for cause, five officers and three enlisted Marines remained on the panel. One of the members, Lieutenant Colonel Ayala, was a member of a racial minority. The prosecutor exercised his sole peremptory challenge against Ayala. Defense counsel asked the trial court to require a race-neutral explanation for the peremptory challenge to the only minority member, and the judge told the prosecutor to "put it on the record why [he] want[ed] to get rid of Colonel Ayala." The prosecutor indicated that he removed Ayala because he was an officer, and the judge accepted this explanation. The court-martial found Petitioner guilty of all the offenses except robbery, of which Petitioner was found not guilty, but guilty of the lesser included offense of larceny. The court-martial sentenced Petitioner to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to pay grade E-1.

On appeal, Petitioner argued the reason given by the prosecutor for challenging Ayala was inadequate because it could have applied equally to any of the five

On appeal, Petitioner argued the reason given by the prosecutor for challenging Ayala was inadequate because it could have applied equally to any of the five officers on the panel. The Navy-Marine Corps Court of Criminal Appeals found that the reason given by the prosecutor for the peremptory challenge was inadequate, but that Petitioner had waived the issue. App. E at 26a-29a. In support of its position during the appeal before that court, the government submitted an affidavit signed by the prosecutor. In this affidavit, submitted more than two-and-a-half years after the trial, the prosecutor provided a new reason for the peremptory challenge of Ayala. The prosecutor stated he had personal knowledge that Ayala did not want to be seated on Petitioner's court-martial, and that he had challenged him in order to do him a favor. The Navy-Marine Corps Court of Criminal Appeals stated even if Petitioner had preserved the issue, the new reason provided by the prosecutor was sufficient. *Id.* at 29a-30a.

The Court of Appeals for the Armed Forces agreed that the reason given by the prosecutor at trial was inadequate because it applied equally to all five officers on the panel, four of whom were Caucasian. App. D at 15a-16a. That court found that Petitioner had not waived the issue, and that the lower court erred by accepting an *ex parte* affidavit from the prosecutor. *Id.* at 16a-18a. The Court of Appeals for the Armed Forces ordered a factfinding hearing, at which the prosecutor was to appear, to determine the prosecutor's reasons for exercising the peremptory challenge against Ayala. *Id.* at 18a-19a. Petitioner moved to reconsider, requesting a

April 15-16, 2002. The government called the original prosecutor as a witness. The prosecutor claimed that on the morning of Petitioner's court-martial, he had had an *ex parte* telephone conversation with Ayala in which Ayala told the prosecutor he was very busy. The prosecutor then asserted he chose to exercise his peremptory challenge against Ayala among all the officers as a favor to Ayala. When asked why he had not given this reason at trial, the prosecutor stated in essence that he did not give this reason because the original judge had accepted his first reason as legitimate. This testimony was given more than five years after Ayala was excused from Petitioner's court-martial. The judge determined the prosecutor's new reason for challenging Ayala was race-neutral, specific, and plausible.

Following the factfinding hearing, the record was returned to the Court of Appeals for the Armed Forces. Before that court, Petitioner argued the government should be estopped from providing new reasons for the peremptory challenge on appeal. The lower court affirmed Petitioner's convictions and sentence. App. A. at 6a. Petitioner filed a petition for reconsideration, which that court denied. App. B.

REASONS FOR GRANTING THE PETITION

> *Only the most overtly discriminatory or impolitic lawyer can be caught in Batson's toothless bite and, even then, the wound will be only superficial.*[1]

After a prosecutor's professed reasons for a peremptory challenge given in a *Batson* hearing are challenged on appeal and later found to be inadequate, the government should be estopped from offering new justifications for the first time on appeal. Estoppel is necessary to preserve the integrity of inquiries into peremptory challenges. In the typical *Batson* inquiry, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003).

One characteristic of a typical *Batson* hearing that promotes accurate assessment of a prosecutor's credibility is the contemporaneous nature of a prosecutor's testimony at the hearing. *United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990); *cf. United States v. Tunnessen*, 763 F.2d 74, 78 (2d Cir. 1985) (requiring contemporaneous statement of "ends of justice" continuance to guard against risk that district

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[1] Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501 (1999).

judge "may simply rationalize his action [in granting the continuance] long after the fact"). Waiting until after a trial to give reasons for a peremptory strike "risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial." *Biaggi*, 909 F.2d at 679. *Post hoc* explanations given by a prosecutor years after the initial reasons are found inadequate are inherently suspect. "[I]t would be unrealistic to believe that the prosecutor could . . . recall in greater detail his reasons for the exercise of the peremptory challenges" years after the challenges themselves. *People v. Snow*, 746 P.2d 452, 458 (Cal. 1987).

For some time following this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), courts permitted prosecutors to give after-the-fact explanations for peremptory challenges where the challenges were made under the lower, pre-*Batson* burden. Because courts and prosecutors could not have had foreknowledge of *Batson's* requirements, courts disregarded the temporal disparity between the questioned challenges and the explanations. *See, e.g., United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987); *People v. Hope*, 560 N.E.2d 849, 866 (Ill. 1990), *vacated by* 501 U.S. 1202 (1991) (GVR in light of *Hernandez v. New York*, 500 U.S. 352 (1991)); *Williams v. Mississippi*, 507 So. 2d 50, 53 (Miss. 1987) (remanding the case "so that the prosecuting attorney might have the opportunity to explain his peremptory challenges would [not] be giving

the prosecution an unfair second bite at the apple, for [at the time of trial] he had no way of knowing the *Batson* apple would have to be bit."). But when the applicability of *Batson* is clear at trial and the trial court requires a contemporaneous reason for exercising the challenge, *post hoc* explanations deserve more suspicion. *See Polk v. Dixie Ins. Co.*, 972 F.2d 83, 86 (5th Cir. 1992).

Nonetheless, appellate courts disagree over the appropriateness of limited remands to correct *Batson* errors. Some jurisdictions still permit *post hoc* rationalizations of peremptory challenges to which the appellant made a *Batson* challenge at trial. *See, e.g., United States v. Romero-Reyna*, 889 F.2d 559, 561 n.6 (5th Cir. 1989), *cert. denied*, 494 U.S. 1084 (1990). These jurisdictions rely on appellate decisions retroactively applying *Batson* in which the prosecutor was not required to give reasons at trial. *See, e.g., id.* (citing *Chalan*, 812 F.2d 1302); *Edmonds v. State*, 812 A.2d 1034 (Md. 2002) (citing *State v. Gorman*, 596 A.2d 629 (Md. 1991)).

Other jurisdictions are closing the door on tardy explanations when the prosecutor had an opportunity to provide reasons at trial. These jurisdictions remand the case for a new trial. *See, e.g., Connecticut v. Robinson*, 676 A.2d 384, 391-92 (Conn. 1996) (finding a new trial is the appropriate remedy where prosecutor declined to put reasons on the record for using a peremptory challenge in response to a *Batson* objection because circumstances surrounding the voir dire cannot be reconstructed fairly in a post-trial hearing); *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989) (rejecting post-trial reasons given by prosecutor after six

to eight hour review of voir dire transcript); *State v. Brock*, 675 N.E.2d 18, 29 (Ohio Ct. App. 1996) (if prosecutor fails to state reasons when given opportunity, appropriate remedy is new trial rather than remand for limited hearing).

In the seventeen years since this Court decided *Batson*, prosecutors have had sufficient time to adapt to that case's requirements. Asking prosecutors to place their reasons for a peremptory challenge on the record contemporaneously with the strike is not onerous. Allowing prosecutors to provide new reasons for challenges after their original reasons are found inadequate undermines confidence in the judicial system's ability to eradicate the effects of racism in jury selection. Additionally, presenting new reasons for the first time years after trial undermines judicial economy. Precedent created after *Batson*, addressing peremptory challenges that occurred before *Batson*, is no longer relevant in determining the appropriate remedy since prosecutors have long been on notice of *Batson's* requirements. Nonetheless, jurisdictions that allow after-the-fact explanations do so on the basis of this antiquated case law.

The issue presented is applicable to every jury trial in the United States. By granting certiorari, this Court can address the problems *post hoc Batson* rationalizations pose to the integrity and efficiency of the judicial system. Appellant respectfully requests this Court grant a writ of certiorari.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 2003

Appendix A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,

v.

Glenn E. HURN, Corporal,
U.S. Marine Corps, Appellant.

No. 00-0301
Crim. App. No. 98-0200

Decided April 23, 2003

For Appellant: Captain Curtis M. Allen, USMC (argued); Lieutenant Marcus N. Fulton, JAGC, USN.

For Appellee: Major Mark K. Jamison, USMC (argued); Colonel Mark W. Fisher Jr., USMC, and Lieutenant Commander Philip L. Sundel, JAGC, USNR (on brief); Colonel Rose M. Favors, USMC, Commander Robert B. Taishoff, JAGC, USN, and Lieutenant Ross W. Weiland, JAGC, USNR.

Amicus Curiae: Douglas K. Yatter (law student) (argued); Steven H. Goldblatt (director), Wendy M. Marantz (supervising attorney), and Hilary C. Kivitz (law student) (on brief) – For the Georgetown University Law Center.

Military Judge: J. A. Bukauskas

PER CURIAM:

After the United States Navy-Marine Corps Court of Criminal Appeals affirmed the Appellant's conviction and sentence[1] (*United States v. Hurn*, 52 M.J. 629 (N-M. Ct. Crim. App. 1999)), this Court remanded the record for a factfinding hearing regarding the prosecution's reasons for exercising its peremptory challenge against the only non-Caucasian officer on the court-martial panel, Lieutenant Colonel (LtCol) Ayala. *United States v. Hurn*, 55 M.J. 446 (C.A.A.F. 2001). Having reviewed the record of the factfinding hearing, we now affirm the decision below.

At trial, the trial counsel had responded to the defense's *Batson*[2] objection to the peremptory challenge by stating that he exercised it "to protect the panel for quorum." *Id.* at 448.[3] The military judge did not ask for an

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[1] Appellant was convicted of multiple sexual offenses with a child and larceny of a motor vehicle, and sentenced to a dishonorable discharge, total forfeitures, confinement for life, and reduction to the lowest enlisted grade.

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibits peremptory challenges based on race. This Court has adopted a per se application of *Batson*, placing the burden on the challenging party, upon timely objection, to provide a race-neutral explanation for the challenge. *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989). The proffered reason for the challenge may not be one "that is unreasonable, implausible, or that otherwise makes no sense." *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

[3] After challenges for cause, the panel consisted of five officer and three enlisted members. By using a peremptory

explanation why one of the four Caucasian officers was not peremptorily challenged instead of the one non-Caucasian officer.

Over two-and-a-half years after the trial, while this case was before the Court of Criminal Appeals, the trial counsel submitted an affidavit, stating that when he notified LtCol Ayala of his selection for court-martial duty (in accordance with R.C.M. 502(d)(5) discussion), LtCol Ayala expressed hope that he would not be seated on the panel because he was extraordinarily busy. However, at the court-martial, LtCol Ayala responded in the negative when the military judge asked if any member had a personal or professional obligation that might cause the member to be unable to devote full attention to the court-martial.

The trial counsel's affidavit also stated that he had known LtCol Ayala professionally for about two years, respected him, and considered him to be fair. The trial counsel "decided to do him a favor and challenge him off the panel so he could return to his duties." *Hurn*, 55 M.J. at 448. Finally, the trial counsel stated that the military judge cut off discussion before he had an opportunity to fully explain his reasons for challenging LtCol Ayala on the record. *Id.* at 449.

This Court declined to resolve the *Batson* issue based on trial counsel's ex parte affidavit, for the following

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challenge against an officer, the prosecution ensured that a peremptory challenge of an enlisted member would not cause the panel to fall below the minimum one-third enlisted membership.

reasons: (1) the affidavit appeared to differ from LtCol Ayala's response to the military judge's inquiry, (2) the affidavit had not been tested in an adversarial setting, (3) the defense counsel had not had an opportunity to dispute the affidavit, and (4) there had been no factual determination by the military judge that the trial counsel's explanation was credible and race neutral. Thus, this Court ordered further inquiry into the reasons for the trial counsel's peremptory challenge.

At the factfinding hearing, the trial counsel was summoned as a witness, as required by this Court's mandate. At the hearing, trial counsel testified consistently with the record of trial and his earlier affidavit. He testified that when LtCol Ayala expressed concern about his "pressing workload," he "gave him the standard advice that [he] gave all prospective members for the panel, that the general nominated him, that he would have to appear." He informed LtCol Ayala that he could inform the court about his workload concerns, but that he was still required to appear at the first day of trial. The trial counsel testified that no other officer member had expressed concerns to him about conflicting workload. He testified that LtCol Ayala's negative response to the military judge's inquiry did not appear to be inconsistent with his own conversation with LtCol Ayala. To the contrary, it was consistent with the trial counsel's understanding of LtCol Ayala: "that if he had to work here at a court-martial for 10 hours and then go back to his office for four or five hours, that's what Lieutenant Colonel Ayala would do."

An affidavit from Colonel (then LtCol) Ayala was received in evidence without objection from either side. Colonel Ayala explained his answer to the military judge's inquiry about conflicting obligations as follows:

> I do not remember clearly the judge's questions and my responses during "voir dire," but I remember feeling by then that although I had a lot on my plate, the Commanding General had selected me and in essence had ordered me to set aside those duties and do the court-martial.

The military judge made detailed findings of fact and conclusions of law. He specifically found that the trial counsel's explanation at trial, "although it was incomplete, is not inconsistent with his fuller explanation at this hearing." He found the trial counsel to be "both credible and forthcoming."

The military judge found Colonel Ayala's affidavit consistent with the trial counsel's testimony. He "accept[ed] as credible" Colonel Ayala's explanation for his response to the military judge's inquiry regarding conflicting workloads. He concluded by finding:

> I find that [the trial counsel], in deciding on whom he would exercise his peremptory challenge, focused first on officers because of his concern regarding quorum, and then on Colonel Ayala because of the previous communication he had with Colonel Ayala regarding his schedule and desire not to be a member. I find this explanation

to be race-neutral and specific, reasonable, and plausible, given all the circumstances of this case.

The military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to "great deference" and will not be overturned absent "clear error." *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996). We hold that the military judge's ruling at the factfinding hearing was not "clear error." Accordingly, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CRAWFORD, Chief Judge (concurring in the result):

I concur in the result. This case is fact specific, thus it is not inconsistent with our prior case law and federal practice, which provide that "in the event . . . post-trial proof becomes necessary to decide a *Batson [v. Kentucky*[4]] issue, we [should] not rule out consideration of a clearly articulated affidavit."[5] Where there is no challenge to the reason given or to the party's credibility, an affidavit,[6] sidebar conference,[7] or in

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[4] 476 U.S. 79 (1986).

[5] *United States v. Moore*, 28 M.J. 366, 368 n. 7 (C.M.A. 1989).

[6] *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987); *see also United States v. Cox*, 23 M.J. 808, 811 (N-M Ct. Crim. App. 1986)(prosecutor's post-trial affidavit met government's burden under *Batson v. Kentucky*, 476 U.S. 79 (1986)).

[7] *United States v. Romero-Reyna*, 867 F.2d 834 (5th Cir. 1989).

camera procedure may be sufficient[8] without ordering a hearing pursuant to *United States v. DuBay*.[9]

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[8] *See, e.g., United States v. Tindle*, 860 F.2d 125 (4th Cir. 1988).

[9] 17 C.M.A. 147, 37 C.M.R. 411 (1967).

Appendix B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,

v.

Glenn E. HURN, Appellant.

No. 00-0301/MC.

Decided May 30, 2003

Appellant's Petition for reconsideration is denied.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,

v.

Glenn E. HURN, Appellant.

No. 00-0301/MC.

Decided December 20, 2001

Appellant's petition for reconsideration denied.

Appendix D

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,

v.

Glenn E. HURN, Corporal,
U.S. Marine Corps, Appellant.

No. 00-0301
Crim. App. No. 98-0200

Argued February 7, 2001
Decided September 27, 2001

GIERKE, J., delivered the opinion of the Court, in which EFFRON and BAKER, JJ., joined. CRAWFORD, C.J., and SULLIVAN, J., each filed a dissenting opinion.

For Appellant: Captain Curtis M. Allen, USMC (argued).

For Appellee: Major Mark K. Jamison, USMC (argued); Colonel Mark W. Fisher Jr., USMC, and Lieutenant Commander Philip L. Sundel, JAGC, USNR (on brief).

Amicus Curiae: Douglas K. Yatter (law student)(argued); Steven H. Goldblatt (director), Wendy M. Marantz (supervising attorney), and Hilary C. Kivitz

(law student) (on brief) – For the Georgetown University Law Center.

Military Judge: J.A. Bukauskas

Judge GIERKE delivered the opinion of the Court.

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of rape of a child under 16 years of age, larceny of a motor vehicle, forcible sodomy of a child under 16 years of age, four specifications of assault of a child under 16 years of age, indecent acts with a child under 16 years of age, and indecent assault of a child under 16 years of age, in violation of Articles 120, 121, 125, 128, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 921, 925, 928, and 934, respectively. The adjudged and approved sentence provides for a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to pay grade E-1. The Court of Criminal Appeals affirmed the findings and sentence. 52 MJ 629 (1999).

On appellant's petition, we granted review of the following issues:[1]

> I. WHETHER THE MILITARY JUDGE ERRED BY GRANTING THE TRIAL COUNSEL'S PEREMPTORY CHALLENGE AGAINST THE SOLE NON-CAUCASIAN MEMBER OF THE

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[1] We heard oral argument in this case in the Philip A. Hart Moot Courtroom, Georgetown University Law Center, Washington, D.C., as part of this Court's Project Outreach. *See United States v. Allen*, 34 MJ 228, 229 n.1 (CMA 1992).

COURT-MARTIAL, WHERE THE TRIAL COUNSEL DID NOT ADVANCE A RACE-NEUTRAL REASON FOR THE CHALLENGE.

II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED BY RETROACTIVELY APPLYING A PROCEDURAL BAR TO A CONSTITUTIONAL CLAIM.

III. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED BY CONSIDERING A POST-TRIAL AFFIDAVIT FROM THE TRIAL COUNSEL OFFERING A SUPPLEMENTAL RACE-NEUTRAL REASON FOR EXCUSING THE SOLE MINORITY MEMBER ON APPELLANT'S COURT-MARTIAL.

For the reasons set forth below, we remand for further proceedings.

A. THE PEREMPTORY CHALLENGE

Appellant elected to be tried by a panel composed of at least one-third enlisted members. *See* Art. 25(c)(1), UCMJ, 10 USC § 825(c)(1); RCM 503(a)(2), Manual for Courts-Martial, United States (2000 ed.).[2] Following group and individual *voir dire* of the panel, the military judge granted two challenges for cause, which reduced the original ten-member panel to eight members -- five

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[2] This Manual provision is identical to the one in effect at the time of appellant's court-martial.

officers and three enlisted persons. The trial counsel then exercised his peremptory challenge against Lieutenant Colonel (LtCol) Ayala, the only non-Caucasian officer on the panel. This peremptory challenge resulted in the following colloquoy:

> Military Judge: All right, thank you. Defense, would you care to use your peremptory challenge?
>
> Defense Counsel: We would, sir, but we'd like to ask for a race-neutral basis for the challenge on Colonel Ayala.
>
> Military Judge: What?
>
> Defense Counsel: We'd like to know --
>
> Military Judge: Colonel Ayala appears to be of Hispanic descent.
>
> Defense Counsel: Yes, sir. I think that *Batson* or its progeny has extended the doctrine to --
>
> Military Judge: Not as far as you're pushing it, but go ahead anyway, Government, and put it on the record why you want to get rid of Colonel Ayala.
>
> Trial Counsel: Sir, the reason the government actually exercised the peremptory was to protect the panel for quorum.
>
> Military Judge: Thank you, that's race neutral. Go ahead, defense. Do you want to use [your peremptory challenge] or not?

Defense Counsel: Yes, sir, we would. We'd like to peremptorily challenge Colonel Blickensderfer.

Military Judge: Okay. Thank you. That will give us a panel --

B. QUORUM CONSIDERATIONS

The Government's reference to "protect[ing] the panel for quorum" reflected the fact that after challenges for cause, there were eight members -- five officers and three enlisted members. If the defense peremptorily challenged an enlisted member, the panel's composition would fall below the minimum one-third enlisted quorum. The prosecution, by using its peremptory challenge to remove an officer, ensured that a peremptory challenge by the defense would not place the enlisted composition below the one-third minimum.

In an affidavit submitted on November 8, 1999, more than two-and-a-half years after the trial, trial counsel stated that he had known LtCol Ayala professionally for about two years, and that he respected him and knew him to be fair. Trial counsel further stated that before the trial, LtCol Ayala told him that, because of his heavy workload, he hoped he would not be seated on the panel. Thus, when it became apparent that the prosecution needed to challenge one officer to protect the quorum, trial counsel "decided to do him a favor and challenge him off the panel so he could return to his duties." Finally, trial counsel stated that he was unable to articulate his additional reason on the record because "the military judge accepted [his] stated reason . . . and quickly moved on to a defense peremptory challenge."

C. EVALUATION OF PEREMPTORY CHALLENGES

Under the equal protection and due process requirements of the Constitution, a party may not utilize a peremptory challenge to exclude persons from the jury venire on account of race or gender. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex.rel. T.B.*, 511 U.S. 127 (1994); *United States v. Santiago-Davila*, 26 MJ 380 (CMA 1988); U.S. Const. amend. V and XIV. In *United States v. Moore*, 28 MJ 366, 368 (CMA 1989), this Court adopted a *per se* rule: upon timely objection to a peremptory challenge, a *prima facie* case of discrimination is established, and the burden shifts to the challenging party to give a race-neutral explanation. The burden remains on the challenging party until a race-neutral reason is given. This Court has further held that, because of the differences in military and civilian tribunals and our holding in *Moore*, a trial counsel may not exercise a peremptory challenge "on the basis of a proffered reason, under *Batson* and *Moore*, that is unreasonable, implausible, or that otherwise makes no sense." *United States v. Tulloch*, 47 MJ 283, 287 (1997).

We hold that the reason proffered in this case does not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect participants in judicial proceedings from racial discrimination. *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (race-based peremptory challenge violates equal protection rights of excluded juror). Trial counsel stated only that he exercised a peremptory challenge to protect

the quorum. If trial counsel's purpose was to protect the quorum, he could have accomplished that by challenging any other officer member. Defense counsel's objection to trial counsel's challenge of LtCol Ayala, the only non-Caucasian member, established a *prima facie* case of racial discrimination. *See Moore*, *supra*. Trial counsel did not overcome this *prima facie* case of discrimination, because he failed to explain why he challenged the only non-Caucasian officer instead of any of the Caucasian officers. Faced with trial counsel's unresponsive explanation and an unrebutted *prima facie* case of discrimination, the military judge was required to make further inquiry or deny the peremptory challenge. Because the military judge did neither, we must remand the case.

The court below held that the military judge erred but that the error was waived. 52 MJ at 630-31. Under the circumstances of this case, we decline to apply waiver. The purpose of requiring a specific objection is to alert the military judge to a disputed issue so that he can resolve it. The record reflects that defense counsel made a timely *Batson/Moore* objection. The military judge responded by twice interrupting defense counsel in mid-sentence, asserting that *Batson* did not go "as far as you're pushing it," and ruling that trial counsel's "reason" was race-neutral, without giving defense counsel an opportunity to disagree. As noted above, trial counsel's post-trial affidavit also asserts that the military judge cut off discussion before he had an opportunity to fully explain his reasons for challenging LtCol Ayala on the record.

With respect to Issue III, we believe that permitting trial counsel to offer a different reason for the peremptory challenge by means of an *ex parte* affidavit submitted more than two-and-a-half years after the fact would undermine the procedures adopted by this Court in *Moore* and *Tulloch*. The affidavit sets out a reason that is different from trial counsel's stated reason at trial, and it appears to differ from LtCol Ayala's negative response during *voir dire* when he was asked, "Do any of you have any type of personal or professional obligation that might cause you to be unable to devote your full attention to these proceedings?"

This Court reached the outer limit on consideration of *ex parte*, after-the-fact justification for a peremptory challenge in *United States v. Gray*, 51 MJ 1, 33-35 (1999). In *Gray*, defense counsel had an opportunity, while the court-martial was still in session, to dispute trial counsel's explanation for the peremptory challenge. In this case, trial counsel's posttrial explanation has not been tested in an adversarial setting. Defense counsel has not had an opportunity to dispute trial counsel's post-trial explanation, and there has been no factual determination by a military judge. Thus, the lower court's finding that trial counsel's posttrial explanation was race neutral (52 MJ at 632) does not end the inquiry.

In *United States v. Ginn*, 47 MJ 236 (1997), this Court recognized the broad, factfinding power of the Courts of Criminal Appeals. This Court also recognized, however, that "Congress intended a Court of Criminal Appeals to act as factfinder in an appellate-review capacity" only

after a trial court made findings based on its consideration of the evidence, "and not in the first instance as a trial court." *Id.* at 242; *see also United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988) (adversarial hearing preferred to resolve *Batson* issues); *United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987) (adversarial hearing required).

Our previous decisions in *Moore* and *Tulloch* compel us to set aside the decision below. In accordance with our precedent, we will order a factfinding hearing to determine the reasons for the peremptory challenge. *See United States v. Ruiz*, 49 MJ 340, 345 (1998); *Moore*, 28 MJ at 368-69; *United States v. Santiago-Davila*, 26 MJ 380, 393 (CMA 1988); *accord Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987).[3]

D. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for submission to a convening authority for a

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[3] We did not remand in *United States v. Tulloch* because of the appellate posture of the case. The court below had determined that the military judge erred by accepting an explanation that was not "a reasonable, racially neutral explanation." The certified issues before us challenged the lower court's reversal of the military judge's ruling but did not challenge the remedy ordered by the court below, which was to set aside the contested findings of guilty and the sentence and authorize a rehearing.

factfinding hearing, with both the prosecution and defense present and participating, for an inquiry into the prosecution's reasons for exercising its peremptory challenge against LtCol Ayala. If the original trial counsel is unable to participate as trial counsel because of his release from active duty, he will be summoned as a witness. After such proceedings are concluded, the record, along with the military judge's findings and conclusions, will be returned directly to this Court. If a factfinding hearing is impracticable, the convening authority may set aside the findings and sentence and order a rehearing.

CRAWFORD, Chief Judge (dissenting):

Trial counsel's explanation for challenging Lieutenant Colonel Ayala, to protect against defense counsel peremptorily challenging an enlisted member, thereby reducing the court-martial panel below the required one-third quorum and delaying the trial while the convening authority appointed additional enlisted members, was a "facially valid" reason for the peremptory challenge. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995). As I have stated on prior occasions, I can find no reason why this Court should deviate from the Supreme Court's teaching in *Purkett*. *See United States v. Chaney*, 53 MJ 383, 386 (2000)(Crawford, C.J., concurring in the result); *United States v. Norfleet*, 53 MJ 262, 273 (2000)(Crawford, C.J., concurring in part and in the result); *United States v. Tulloch*, 47 MJ 283, 289 (1997) (Crawford, C.J., dissenting).

Under either *Purkett* or the more restrictive standard of *Tulloch*, *supra* at 287, appellant has failed to demonstrate that trial counsel's challenge of Lieutenant Colonel Ayala constituted a denial of equal protection. To the contrary, trial counsel's challenge was legitimate, reasonable, and made good sense. Accordingly, I would affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals.

SULLIVAN, Judge (dissenting):

The majority sets aside the Court of Criminal Appeals decision affirming appellant's life sentence and his criminal conviction for the rape, *inter alia*, of a 14-year-old girl. It does so based on post-trial speculation about the motive of the Government in exercising a peremptory challenge. Appellant argues on appeal that trial counsel's "numbers game" reason was not race-neutral, in view of the fact that it could have equally applied to other unchallenged Caucasian officers on the court. Unlike the majority, I would follow Supreme Court case law, particularly when such an argument is presented for the first time on appeal. *See generally New York v. Hill*, ___ U.S. ___, ___, 120 S.Ct. 659, 664 (2000). In my view, waiver clearly occurred here by appellant's failure to make this argument at trial. *See United States v. Elliott*, 89 F.3d 1360, 1367 (8th Cir. 1996). Therefore, I would affirm.

With respect to *Batson* challenges, my position is clear. *See United States v. Chaney*, 53 MJ 383, 386 (2000) (Sullivan, J., concurring in the result); *United States v. Tulloch*, 47 MJ 283, 289 (1997) (Sullivan, J.,

dissenting). *See also United States v. Norfleet*, 53 MJ 262, 273 (2000) (Sullivan, J., concurring in part and in the result). Moreover, I continue to urge Congress to eliminate the peremptory challenge in the military justice system. *United States v. Tulloch*, *supra* at 289 n.*; *United States v. Chaney*, *supra* at 386.

Appendix E

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

R.B. LEO D.A. ANDERSON JOHN W. ROLPH

UNITED STATES

v.

Glenn E. HURN
Corporal (E-4), U.S. Marine Corps

PUBLISH
NMCM 98 00200 Decided 29 December 1999

Sentence adjudged 9 April 1997.
Military Judge: J.A. Bukauskas.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, U.S. Marine Corps Forces, Atlantic, MCAS, Cherry Point, NC

LT DALE O. HARRIS, JAGC, USNR, Appellate Defense Counsel
LT KEVIN S. ROSENBERG, JAGC, USNR, Appellate Government Counsel

ANDERSON, Judge:

Contrary to his pleas, the appellant was found guilty of rape of a child under 16 years of age, larceny of a motor vehicle, forcible sodomy with a child under 16 years of age, four specifications of assault consummated by a battery on a child under 16 years of age, indecent acts with a child under 16 years of age, and indecent assault in violation of Articles 120, 121, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 921, 925, 928, and 934 (1994). A panel of officer and enlisted members sitting as a general court-martial sentenced him to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

After carefully considering the record of trial, the 15 assignments of error, the Government's response, and oral arguments, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ. We discuss below the six assignments of error that warrant comment. The remaining assignments of error, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), have been considered and are found to be without merit.[1]

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[1] VII. APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE PERJURED TESTIMONY OF TWO GOVERNMENT WITNESSES; VIII. APPELLANT'S CONFIDENTIAL STATEMENTS DURING A SANITY

Peremptory Challenge

In his first assignment of error, the appellant contends that the military judge erred by granting the trial counsel's peremptory challenge against the sole non-

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EVALUATION WERE IMPROPERLY ADMITTED AT TRIAL; IX. ARTICLE 16, UCMJ, IS UNCONSTITUTIONAL BECAUSE IT PERMITS JURIES CONSISTING OF LESS THAN TWELVE MEMBERS, THEREBY DENYING APPELLANT DUE PROCESS OF LAW; X. THE MILITARY JUDGE ERRED BY NOT INSTRUCTING THE MEMBERS THAT MAJOR DEPRESSION WAS A SEVERE MENTAL DISEASE OR DEFECT; XII. THE SANITY EVALUATION CONDUCTED BY THE GOVERNMENT WAS INADEQUATE AS A MATTER OF LAW; XIII. APPELLANT SUFFERED ILLEGAL PRETRIAL CONFINEMENT, IN VIOLATION OF ARTICLE 13, UCMJ; XIV. APPELLANT SUFFERED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT; XV. APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION, RIGHT TO DUE PROCESS, AND THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE UNITED STATES DISCIPLINARY BARRACKS' REVOCATION OF ADMINISTRATIVE "GOOD TIME" CREDIT; XVI. THE TRIAL COUNSEL ENGAGED IN PROSECUTORIAL MISCONDUCT BY USING HIS PEREMPTORY CHALLENGE AGAINST LTCOL AYALA, THE ONLY MINORITY MEMBER DETAILED TO THE COURT-MARTIAL. (Note that there was no assignment of error XI.)

Caucasion member of the court-martial, where the trial counsel did not advance a race-neutral reason for the challenge. Although we find error in the military judge's ruling, the error was not preserved and was thus waived.

Following group and individual voir dire of the members and challenges for cause, the military judge asked the Government whether it desired to exercise its peremptory challenge. The following exchange took place:

MJ: Government, do you care to use your peremptory challenge?

TC: Yes, sir. We'd perempt (sic) Colonel Ayala.

MJ: All right, thank you. Defense, would you care to use your peremptory challenge?

ADC: We would, sir, but we'd like to ask for a race-neutral basis for the challenge on Colonel Ayala.

MJ: What?

ADC: We'd like to know --

MJ: Colonel Ayala appears to be of Hispanic descent.

ADC: Yes, sir. I think that Batson or its

progeny has extended the doctrine to --

MJ: Not as far as you're pushing it, but go ahead anyway, government, and put it on the record why you want to get rid of Colonel Ayala.

TC: Sir, the reason the government actually exercised the peremptory was to protect the panel for quorum.

MJ: Thank you, that's race neutral. Go ahead, defense. Do you want to use it or not?

ADC: Yes, sir, we'd like to peremptorily challenge Colonel Blickensderfer.

Record at 118.

The member who was peremptorily challenged by the Government, Lieutenant Colonel Ayala, was Hispanic, and the only non-Caucasian on the original 10-member panel. The appellant is an African-American. At the time of the Government's peremptory challenge, five officers and three enlisted members remained on the panel. The defense counsel posed no objection to the reason offered by the Government in support of its peremptory challenge. The appellant's failure to object to the reason offered by the Government for the peremptory challenge waived the issue on appeal. *United States v. Walker*, 50 M.J. 749 (N.M.Ct.Crim.App. 1999), *pet. denied*, __ M.J. __ (Oct 22, 1999). We find no plain error. *See* Art. 59(a),

UCMJ; *United States v. Powell*, 49 M.J. 460, 461-65 (1998); *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986).

Even if the issue had been preserved, we would provide no relief. A criminal defendant may object to a race-based peremptory challenge by the Government, even though he and the excluded member do not share the same race. *Powers v. Ohio*, 499 U.S. 400 (1991); *United States v. Woods*, 39 M.J. 1074, 1076 (A.C.M.R. 1994). *See also United States v. Greene*, 36 M.J. 274, 278 n.3 (C.M.A. 1993); *United States v. Santiago-Davila*, 26 M.J. 380, 389-92 (C.M.A. 1988). A Government counsel is then required to explain the reason for the challenge. *United States v. Ruiz*, 49 M.J. 340, 344 n.2 (1998); *United States v. Moore*, 28 M.J 366, 368 (C.M.A. 1989); *United States v. Cruse*, 50 M.J. 592, 595 (Army Ct.Crim.App. 1999). The explanation given must be race-neutral, related to the case, and legitimate (i.e., neither unreasonable, implausible, or nonsensical, or a pretext for intentional or purposeful discrimination). *United States v. Tulloch*, 47 M.J. 283, 285-87 (1997); *Moore*, 28 M.J. at 369.

In this case, the Government counsel justified his peremptory challenge of the sole minority member of the panel in order "to protect the panel for quorum." Such tactical jockeying is known as playing the "numbers game." *United States v. Witham*, 47 M.J. 297, 299 (1997); *United States v. Newson*, 29 M.J. 17, 19-20 n.1 (C.M.A. 1989); *See United States v. Fetch*, 17 C.M.R. 836, 844 (A.C.M. 1954); *United States v. Simoy*,

46 M.J. 592, 627 (A.F.Ct.Crim.App. 1996). By eliminating one of the remaining five officers, the Government counsel was ensuring that if the defense counsel exercised his peremptory challenge against one of the enlisted members, the panel would remain above the one-third enlisted membership requirement. Art. 25(c)(1), UCMJ.

The military judge accepted the Government's explanation as race-neutral, but failed, as he was required to do, to determine on the record whether the explanation was related to the case and legitimate. *Greene*, 36 M.J. at 281. Specifically, the military judge should have inquired as to why this "numbers game" challenge was directed at the lone minority member of the panel. Despite this failure, we can assume from our reading of the record that implicit in his acceptance of the Government's explanation was a determination that it was related to the case and legitimate. *See United States v. Gray*, 51 M.J. 1, 34-35 (1999).

Where we find error is in the military judge's implied determination that the reason given was legitimate. Generally, a tactical explanation, such as the use of the "numbers game," will be insufficient to sustain a peremptory challenge of a minority member. *See United States v. Gibbs*, 174 F.3d 762, 793-94 (6th Cir. 1999). In this case, if the Government counsel had simply wanted to play the "numbers game," he could just as easily have chosen any of the four remaining Caucasian officer members to challenge. The fact that he challenged the sole minority officer rather than any one

of the four Caucasian officers required a further, race-neutral explanation. *See Gibbs*, 174 F.3d at 794. The Government counsel needed to specifically address why he challenged this particular member.

Through a post-trial affidavit, the Government counsel explains that in addition to the "numbers game" explanation, he challenged the minority member because of his personal knowledge[2] of that member's heavy workload. Affidavit of John R. Marti of 8 Nov 1999.[3] We find this reason to be race-neutral, related to the case, and legitimate. *See State v. Hernandez*, 823 P.2d 1309 (Ariz. Ct. App. 1991)(striking prospective juror because of perceived or anticipated fatigue caused by working two jobs held to be acceptable, neutral

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[2] "There is no requirement that a peremptory challenge be supported by the voir dire conducted at appellant's court-martial." *Cruse*, 50 M.J. at 597-98. The challenge can be based on answers that a member gave in prior trials, or on matters learned from a member "in discussions with [counsel] outside of the courtroom." *Id.* at 597.

[3] We accept the post-hoc rationale provided by the Government counsel with a high degree of caution. We note in this regard, however, that the appellant did not file a conflicting affidavit from either the trial defense counsel or the member at issue. Although a post-trial affidavit may be used to explain the reason for or the intent behind a peremptory challenge of a minority member, a limited fact-finding hearing authorized by *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967) will often be necessary. *See Gray*, 51 M.J. at 65-71 (Effron, J., dissenting); *Ruiz*, 49 M.J. at 344-45; *Moore*, 28 M.J. at 368-69.

explanation for peremptory strike). *See also Cruse*, 50 M.J. at 596-98 (holding that court member's anti-defense bias exhibited in prior trials was legitimate explanation for peremptory challenge). Consequently, had the appellant preserved the peremptory challenge issue, we would have sustained the Government's challenge.

Factual Sufficiency

In his second assignment of error, the appellant asserts that because at the time of the offenses he suffered from a severe mental disease or defect and was unable to appreciate the nature and wrongfulness of his actions, the evidence is factually insufficient to sustain his conviction. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). After carefully reviewing the record, we find that the evidence satisfies this test, and we are convinced of the appellant's guilt beyond a reasonable doubt.

Sentence Appropriateness

In his third assignment of error, the appellant contends that his sentence, including confinement for life, is inappropriately severe. We have carefully reviewed the record of trial and find that the sentence is appropriate in all respects for these offenses and this offender. *United*

States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)(citing *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The offenses committed by the appellant were heinous, deserving of the maximum punishment. The appellant, a noncommissioned officer, raped his 14-year-old stepdaughter on numerous occasions over a six month time frame. When she was experiencing her menstrual cycle, instead of raping her, he would move his penis between her breasts until he ejaculated. He also forced her to perform oral sex on him on numerous occasions. In a letter written to his wife from the brig, the appellant admitted to committing acts of sexual abuse on his stepdaughter on about 33 occasions. Prosecution Exhibit 9 at 10-11. When his stepdaughter was uncooperative or upset him, he assaulted her by holding her head under running water, choking her, and placing a pillow over her face. Once the allegations of the sexual abuse came to light and the appellant was detained by his command, he stole a car and fled.

At trial, the defense psychologist made the following damaging comments about the appellant's future dangerousness:

> I think that [the appellant] is dangerous. I think the behaviors that he demonstrated were potentially life-threatening. I think that they are dangerous. Again, it's prompted by a very strong drive or urge to get again in almost a psychotic way this child or people to respond to him.

> Fortunately this behavior was interrupted by [his stepdaughter's] finally coming to authorities and alerting them that this was going on. It is frightening to think about what might have happened had this not intervened. . . . [T]his person needs to be in a hospital designed for a safe setting where these aberrant thoughts and behaviors can be adequately treated.

Record at 312.

In addition, a child psychologist testified in aggravation that the stepdaughter was very traumatized by the sexual abuse, exhibited many of the symptoms of post-traumatic stress disorder, and would need therapy to avoid chronic depression and anxiety, as well as problems in relating to others. Record at 428-29.

Although we are sympathetic to the evidence of the appellant's psychological problems and his impoverished and abusive childhood, after reviewing the entire record, we nonetheless find that the balance between the appellant's crimes and the approved sentence was fairly struck. We are confident that the members gave individualized consideration to the nature of the offenses and the character of the offender in reaching a just sentence. To grant sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *United States v. Spurlin*, 33 M.J. 443, 444 (C.M.A. 1991); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Denial of Mitigation Specialist

In his fourth assignment of error, the appellant argues that the military judge erred when he denied his motion for the services of a mitigation specialist, who was requested to prepare a comprehensive social history of the appellant. At trial, the military judge concluded that, in view of the fact that the appellant had been represented by counsel for over six months and that a licensed clinical psychologist had been provided by the Government to assist the defense, the appellant had failed to show the necessity for the expert assistance. Record at 13. After reviewing the record, we find that the military judge properly determined that the defense had failed to show the requisite need for the services and that he did not abuse his discretion. *See United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). *See also United States v. Gonzalez*, 39 M.J. 459, 460-61 (1994); *United States v. Kelly*, 39 M.J. 235, 237-38 (C.M.A. 1994); *United States v. Robinson,* 39 M.J. 88, 89 (C.M.A. 1994). Adequate alternatives were available to the appellant to develop, evaluate, and interpret evidence about his background and social history. In fact, such evidence was presented at trial by the appellant's mother, the psychologist hired to assist the defense, and the appellant himself in an unsworn statement. Record at 225-31, 243-63, and 441. The denial of the mitigation specialist did not result in a "fundamentally unfair trial," and we find no material prejudice. *Kelly*, 39 M.J. at 237 (quoting *Moore v. Kemp*, 809 F.2d 702, 712, *cert. denied*, 481 U.S. 1054 (1987)); Art. 59(a), UCMJ.

Staff Judge Advocate's Recommendation

In his fifth assignment of error, the appellant asserts that the staff judge advocate (SJA) committed plain error by not commenting on his allegation of legal error in his post-trial submission regarding the issue of the denial of a mitigation specialist. Clearly, the SJA erred by failing to state his agreement or disagreement with the appellant's allegation of error. *See United States v. Hamilton*, 47 M.J. 32, 35 (1997); RULE FOR COURTS-MARTIAL 1106(d)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). However, because we have found that the military judge properly denied the appellant's motion for a mitigation specialist, we conclude that the SJA's error did not prejudice the appellant. *United States v. Welker*, 44 M.J. 85, 89 (1996); *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988)(holding that because any legal error claimed by defense counsel "lacked merit and would not have resulted in either a comment by the staff judge advocate favorable to [appellant] or to any 'corrective action' by the convening authority," appellant suffered no prejudice).

Instructions

In his sixth assignment of error, the appellant claims that the military judge erred by instructing the members that a "personality disorder" could not constitute a severe mental disease or defect. Because the appellant failed to object to the instruction given or to request any special instruction, we find that he waived this issue. R.C.M.

920(f); *United States v. Smith*, 50 M.J. 451, 455-56 (1999). Even if the issue were not waived, we find no error. In defining a severe mental disease or defect for the members, the military judge employed the standard instruction from the Military Judges' Benchbook: "You are advised that the term 'severe mental disease or defect' can be no better defined in the law than by the use of those terms themselves; however, a severe mental disease or defect does not, in the legal sense, include any abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders." Record at 406; *see* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 778 (30 Sep 1996). This definition corresponds closely with that provided in the Manual for Courts-Martial. R.C.M. 706(c)(2)(A)("The term 'severe mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or by minor disorders such as nonpsychotic behavior and personality defects."). We agree that the term "severe mental disease or defect" does not include nonpsychotic personality disorders. Obviously, we find no plain error. *See Powell*, 49 M.J. at 461-65.

Conclusion

Accordingly, we affirm the findings and sentence as approved on review below.

For the Court
CHRISTINE E. SHEEHY
Clerk of Court (Acting)